

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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3 U.S. COMMODITY FUTURES TRADING
4 COMMISSION,

5 Plaintiff,

6 v.

16 CV 6544 (WHP)

7 DEUTSCHE BANK AG,

8 Defendant.
9 -----x

New York, N.Y.
October 6, 2016
11:10 a.m.

10 Before:

11 HON. WILLIAM H. PAULEY III,

12 District Judge

13 APPEARANCES

14 U.S. COMMODITY FUTURES TRADING COMMISSION

15 Attorneys for Plaintiff

16 AMANDA LEIGH BURKS

17 RICHARD A. GLASER

18 SKADDEN, ARPS, SLATE, MEAGHER & FLOM

19 Attorneys for Defendants

20 DAVID MEISTER

21 CHAD ERIC SILVERMAN

22 DEUTSCHE BANK COUNSEL ANDREW CATTELL

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1 (Case called)

2 THE COURT: Good morning, counsel. I set this matter
3 down for a conference.

4 Who wants to be heard?

5 MS. BURKS: We'd like to be heard, your Honor.

6 THE COURT: Fine. Would you take the podium, please.

7 MS. BURKS: Your Honor, Deutsche Bank is required to
8 report certain swap data pursuant to the Commodity Exchange
9 Act, commission regulations, and pursuant to a prior CFTC
10 order entered last September.

11 In our complaint, the CFTC alleged that from at least
12 April 16, 2016, and continuing to the present, Deutsche failed
13 and continues to fail to meet many of these swap reporting
14 obligations.

15 THE COURT: The problems go back long before that
16 though, don't they?

17 MS. BURKS: The prior order entered last year by the
18 CFTC addressed conduct beginning in January 2013. So, yes.
19 The initial problems do go back to the beginning of Deutsche
20 Bank's reporting obligations.

21 THE COURT: January 2013 was essentially the time that
22 Deutsche Bank was first provisionally registered; right?

23 MS. BURKS: That is correct.

24 THE COURT: So, since the beginning, there have been
25 problems.

1 MS. BURKS: That's correct, your Honor. So the
2 parties are here today to request the entry of the proposed
3 consent order because it is fair and reasonable and because the
4 preliminary injunctive relief sought, namely, the appointment
5 of an independent monitor, serves the public interest by
6 ensuring the integrity of the data generated and reported by
7 Deutsche Bank.

8 To that end, at the Court's direction, the parties
9 have submitted three recommendations for potential monitors.
10 Your Honor, we also have the CVs and a slide deck from Chatham
11 Financial today for your consideration if you're so interested.

12 THE COURT: I was going to ask for those materials in
13 any event.

14 What did the vetting process look like to select a
15 proposed monitor?

16 MS. BURKS: From the CFTCs end, we conducted a broad
17 search. I can tell you at the outset, it was a difficult task
18 because this is a relatively new space, but we searched for a
19 number of data reporting companies like Chatham Financial. We
20 also interviewed a number of the larger consulting firms to see
21 if they had the ability to take on this role.

22 So we conducted a broad search on our end.
23 Unfortunately, there aren't a whole lot of entities in this
24 space that have experience taking on a task like this, but we
25 were able to find a few. However, a lot of them were

1 conflicted. They had already had ongoing business with
2 Deutsche Bank and admittedly could not serve as independent
3 monitors.

4 THE COURT: How is swap reporting any different from
5 other reporting systems?

6 MS. BURKS: Well, I suppose it's different in the
7 sense that it is a newer space. So I think --

8 THE COURT: What does that mean?

9 MS. BURKS: Let me back up. So when Congress passed
10 the Dodd-Frank Act, they tasked the Commission with overseeing
11 the swaps market and passing regulations that would allow for
12 this oversight.

13 To that end, the Commission drafted Part 43 and Part
14 45 of the Commission regulations that are at issue here today.
15 Those regulations explain what the swap reporting
16 responsibilities are for the dealers.

17 Part 43 reporting is the real-time public tape
18 recording requirement. If you think about it, it is similar to
19 a stock ticker. So this is real-time pricing information
20 that's coming from the source, coming from the dealers who are
21 entering these swap transactions.

22 So one of the challenges with Part 43 reporting is
23 making sure that swap data is submitted in a timely fashion
24 because the entire purpose of it is to provide real-time market
25 information to market participants in the public.

1 THE COURT: Just like other financial markets; right?

2 MS. BURKS: That's right. That's right. But it's a
3 newer space. So, instead of, you know, submitting information
4 in the stock market, which has been done for years and years
5 and years, this is being conducted in the swaps market which
6 had never been done before previously.

7 Now, a different set of data is required to be
8 submitted under Part 45 of the regulations. That set of data
9 is only for Commission use. So it's a more voluminous set of
10 data, and it's used for the CFTC to evaluate systemic risk and
11 monitor market activity overall.

12 So it's a different set of data but also very
13 important. There are critical, critical components for the
14 CFTC to meet its mission in regulating the swaps market.

15 THE COURT: In the CFTC's September 30, 2015, order,
16 you refer to a consulting firm that Deutsche Bank retained to
17 resolve the issues that the CFTC had been investigating since
18 2014. Right?

19 MS. BURKS: That is correct.

20 THE COURT: Who was that consulting firm?

21 MS. BURKS: It was Deloitte.

22 THE COURT: Is Deloitte still involved in this
23 process?

24 MS. BURKS: I would have to defer to counsel.

25 THE COURT: Why do you have to defer to counsel?

1 Isn't the CFTC monitoring these things?

2 MS. BURKS: We are monitoring these things, and we
3 have received two interim reports from Deutsche Bank on their
4 progress under the 2015 order.

5 THE COURT: Did you receive an interim report last
6 week on September 30?

7 MS. BURKS: We received one, I believe, at the
8 beginning of this week, if I'm not mistaken.

9 THE COURT: It would be helpful to the Court to see
10 those reports.

11 MS. BURKS: I have copies of them if you'd like them
12 now, your Honor.

13 THE COURT: You can hand them up at the conclusion of
14 the proceeding.

15 What I guess I'm trying to convey is that a court
16 needs information about what the CFTC and Deutsche Bank are up
17 to in this matter.

18 I directed that I wanted at least three candidates for
19 a monitorship, and you submit three names. They are certainly
20 underwhelming, aren't they?

21 MS. BURKS: We believe that Chatham Financial is best
22 suited to take on this task and that they --

23 THE COURT: I know, but you nominated two others for
24 the Court's consideration. Right?

25 MS. BURKS: Yes.

1 THE COURT: But you say you and Deutsche Bank didn't
2 complete your vetting of those individuals. Right?

3 MS. BURKS: So we fully vetted Chatham Financial, both
4 sides.

5 THE COURT: What does that mean?

6 MS. BURKS: So the CFTC and, as I understand it,
7 Deutsche Bank conducted numerous interviews and held several
8 meetings with representatives from Chatham Financial, and I
9 believe Deutsche Bank has also completed an engagement letter
10 with Chatham Financial that will become effective if they are
11 appointed in this matter.

12 THE COURT: Who initially proposed Chatham Financial?
13 The CFTC or Deutsche Bank?

14 MS. BURKS: I believe the CFTC initially proposed
15 Chatham Financial. So, when we say "fully vetted,"
16 your Honor --

17 THE COURT: Were you involved in that vetting process?

18 MS. BURKS: Yes, I was.

19 THE COURT: When you just say, "I believe," that's
20 just a figure of speech? You're telling me that you're the
21 point person on it?

22 MS. BURKS: I am.

23 THE COURT: So did you propose Chatham Financial?

24 MS. BURKS: Yes.

25 THE COURT: Did you propose Messieurs Gregg and

1 Tupper?

2 MS. BURKS: Those two candidates were proposed by
3 Deutsche Bank.

4 THE COURT: Did the CFTC vet those individuals?

5 MS. BURKS: We have not yet vetted those individuals.

6 THE COURT: Do you know that according to his website,
7 Mr. Tupper is currently a full-time student at Emory Law
8 School? Are you aware of that?

9 MS. BURKS: I was not aware of that, your Honor.

10 THE COURT: It's stunning.

11 Mr. Meister, was it your idea to suggest Mr. Tupper?

12 MR. MEISTER: Your Honor, may I speak from here?

13 THE COURT: No. Take the podium for a moment. I want
14 to be able to hear you.

15 MR. MEISTER: Your Honor, I personally got engaged in
16 this matter after the bank had first spoken to Mr. Tupper. So
17 it wasn't my personal suggestion. However, we --

18 THE COURT: Do you know that he's in some master's
19 program for nonlawyers at Emory University?

20 MR. MEISTER: Your Honor, I did not know that.

21 THE COURT: Well, I found it in two minutes.

22 MR. MEISTER: I appreciate that, your Honor. What we
23 were focusing on with respect to Mr. Tupper is his experience
24 in this area and thought that his experience is substantial
25 because of his association with swaps reporting for a number of

1 years.

2 THE COURT: He says he's making a career change.
3 That's the best that Deutsche Bank can come up with? Somebody
4 who is in a two-year, full-time program at Emory Law School as
5 a student?

6 MR. MEISTER: Your Honor, actually, the best that we
7 could come up with was Chatham Financial. As the CFTC had
8 suggested in its memorandum, it's accurate to say that that is
9 the best we could come up with.

10 THE COURT: What experience does Chatham Financial
11 have in this, as CFTC's counsel has characterized it, "new
12 space"?

13 MR. MEISTER: Your Honor, one of the things is that
14 Chatham Financial is a member of the CFTC's market risk
15 advisory group. That group advises the Commission on matters
16 related to market structure, movement of risk across clearing
17 houses which implicates swaps reporting. They advise on
18 matters such as risk across exchanges, intermediaries, market
19 makers, and users.

20 Chatham has built and managed a derivatives reporting
21 platform that's used by over 300 clients. We understand,
22 Judge, that it's one of the largest third-party submitters of
23 trade reports to DTCC, which is the swaps data repository
24 relevant to this matter.

25 A number of different areas in Deutsche Bank through

1 this vetting process spoke directly with the Chatham people.
2 That's Deutsche Bank International tech, operations,
3 compliance, and legal. And prior outside counsel also spoke
4 substantially to Chatham.

5 Judge, just to be transparent here, at least from
6 Deutsche Bank's perspective, we were comfortable with CFTC's
7 suggestion to vet Chatham, and we spent a lot of time -- the
8 bank spent a lot of time sitting with Chatham and being
9 comfortable with that.

10 It is true -- and we agree -- that it is difficult to
11 find an independent monitor with substantial experience in this
12 space. I'm using the same words, but it is a brand new post
13 Dodd-Frank world.

14 THE COURT: What makes it so different from other
15 spaces?

16 MR. MEISTER: Because prior to Dodd-Frank and the
17 CFTC's promulgation of these rules, there was really no
18 regulation to speak of or this sort of regulation of the swaps
19 market. There was no reporting. There was no systems. There
20 was no tape. There was no provision of real-time information.

21 The banks and the dealers have been building these
22 systems from the ground up, and it's challenging, in part,
23 because of the speed with which the information has to be shot
24 to the tape and to the SDR.

25 We talk about the ticker tape. The ticker tape has

1 been around for many years. Those systems are embedded in the
2 broker/dealers, and they've been tinkered with for years and
3 years. This is all brand new stuff.

4 The Dodd-Frank Act -- we support this. The Dodd-Frank
5 Act brought the swaps market into transparency and into the
6 sunlight. That was the purpose of all of this.

7 THE COURT: That was nearly four years ago.

8 MR. MEISTER: Yes. Your Honor, that's one of the
9 reasons that I think we're sitting in this courtroom today is
10 because it was four years ago.

11 Deutsche Bank is committed, Judge. These are just
12 words, but we're committed to getting the reporting obligations
13 corrected. This is also why we consented to the appointment of
14 a monitor, so that the CFTC and hopefully your Honor is
15 satisfied with Deutsche Bank's efforts.

16 THE COURT: Is Deloitte still serving as a consultant
17 on this matter?

18 MR. MEISTER: No, your Honor.

19 THE COURT: When was Deloitte discharged?

20 MR. MEISTER: Your Honor, we can get you more
21 information on this, Judge. The Deloitte engagement was
22 relatively narrow. It is mentioned in the CFTC's letter, but
23 that was a relatively brief and narrow engagement. We can't
24 hire Deloitte because they're not independent. Deloitte has
25 other engagements with Deutsche Bank.

1 THE COURT: Why can't a large financial institution
2 like Deutsche Bank utilize its own compliance and technology
3 departments to develop a plan to fix this matter?

4 MR. MEISTER: Your Honor, we can. We're committed to
5 doing that. Again, we consent to the appointment of the
6 monitor, but whether or not your Honor appoints a monitor,
7 Deutsche Bank has its obligations. It takes those obligations
8 seriously and is committed to getting all of its reporting
9 obligations met.

10 THE COURT: Has it met its obligations under the
11 September 2015 order?

12 MR. MEISTER: Yes, your Honor. I say that because the
13 obligations are to -- there are a set of undertakings over a
14 period of months. We filed the second interim report on
15 September 30.

16 Maybe it didn't make its way to the CFTC in Washington
17 before earlier this week, but we filed it on September 30.
18 We're happy to -- and I think the CFTC said as well that we're
19 happy to provide your Honor with the interim reports.

20 THE COURT: What are the proposed terms of engagement
21 between Deutsche Bank and Chatham?

22 MR. MEISTER: Yes, your Honor. I can hand up a copy
23 if your Honor would like. Can I just give a little bit of
24 background on this?

25 THE COURT: Sure.

1 MR. MEISTER: So, your Honor, the letter with Chatham
2 Financial is dated September 20, 2016. That's a couple of days
3 before your Honor's order asking for three.

4 The letter is the culmination of back-and-forth with
5 Chatham between Deutsche Bank and Chatham to reach terms. I
6 just wanted your Honor to know that we didn't sign the letter
7 of engagement after your Honor's order. We signed it before.
8 But it is not effective unless your Honor appoints Chatham.

9 I think it's beneficial to have terms of engagement at
10 least with Chatham, although your Honor may not pick them and
11 your Honor may pick another monitor. Or your Honor may not
12 appoint a monitor. I understand that.

13 If your Honor were to pick Chatham, we would be ready
14 to hit the ground running.

15 May I approach?

16 THE COURT: You may.

17 MR. MEISTER: Your Honor, with respect to the letter
18 that I just handed up dated September 20, we would ask if
19 your Honor is going to file that, that it be filed under seal
20 because it contains confidential information of Deutsche Bank.

21 THE COURT: Very well. Very recently you submitted a
22 letter in which you noted that the CFTC intends to propose
23 extending the time for the monitor to make a first filing.

24 Why is that?

25 MR. MEISTER: Perhaps the CFTC would be best to speak

1 to that, your Honor. My understanding is there was a concern
2 that if your Honor were to appoint the monitor today, that the
3 90 days was too short of a period of time. The exact reasons,
4 Judge, I'm not 100 percent sure of.

5 MS. BURKS: I can speak to them.

6 THE COURT: Sure. Go ahead, Ms. Burks.

7 MS. BURKS: We're again referring to paragraph 6 of
8 the proposed consent order, which requires the monitor to
9 provide the Court within 90 days of entry of the order an
10 initial assessment of a timeline of tasks to be completed at
11 Deutsche Bank.

12 The concern now is if the order is entered today, the
13 90-day period would fall across a number of holidays, and
14 scheduling necessary personnel at Deutsche Bank and Chatham to
15 meet and sit and really assess the problems in a fulsome manner
16 might be difficult to achieve over the holidays. So we
17 requested -- and Deutsche Bank consented -- to an extension of
18 the 90-day deadline to 120 days.

19 THE COURT: I'm just wondering why it takes 90 days to
20 examine a problem that's been longstanding. The information is
21 out there. Right?

22 MS. BURKS: In a sense, your Honor, I think the
23 information is out there. However, from my understanding of
24 Deutsche Bank's swap reporting systems, as rudimentary as it
25 is, it's an understanding that these systems are incredibly

1 complex. They consist of a number of legacy systems that have
2 been kind of patched together over the years to achieve the new
3 swap reporting goals.

4 With that said, we anticipate that it will take some
5 time for the monitor to really dive in and figure out where all
6 the problems lie. The idea here is to have a thorough analysis
7 of the complete system so that we're not back here in six
8 months on another reporting issue. We want to make sure that
9 this is a fulsome report in the first instance to your Honor.

10 THE COURT: Why does the CFTC think that the monitor
11 will need two years to implement the recommendations?

12 MS. BURKS: At this stage, we're simply not certain of
13 the extent of the damage and the extent of the repairs
14 necessary. So we put a two-year cap on the monitorship, but
15 we're hopeful that some, if not all of that, will be completed
16 before the two-year period ends.

17 THE COURT: Aren't there other financial institutions
18 involved in the swaps market that have the technology and the
19 platforms established to correctly report?

20 MS. BURKS: Yes.

21 THE COURT: I just don't understand what the big
22 mystery is at Deutsche Bank. What is it? You've been on the
23 case for far longer than I have, since June of 2014. So what
24 is it that makes Deutsche Bank so, I'll say incorrigible, when
25 it comes to straightening out their reporting system?

1 MS. BURKS: I don't have that answer, your Honor. I
2 cannot pinpoint exactly what the precise problems are with
3 Deutsche Bank, but I can tell you that the problems are
4 numerous, and all of the attempts thus far by Deutsche Bank to
5 correct these problems often resulted in more problems
6 developing.

7 So the system is certainly broken, and our goal here
8 today is to get an independent monitor on site at Deutsche Bank
9 to help them remediate all of the problems that plague their
10 swap reporting system and to bring them into compliance with
11 the regulations.

12 THE COURT: It sounds like a crisis, doesn't it?

13 MS. BURKS: Yes.

14 THE COURT: Yet you come here now and tell me that you
15 want to extend from 90 days to 120 days the time for the
16 monitor to make some recommendations because there are holidays
17 and Deutsche Bank will be out on holiday.

18 Does that make any sense?

19 MS. BURKS: If your Honor wishes that we expedite the
20 process to a shorter time period, we're certainly open to that.

21 THE COURT: I will tell you that the process is going
22 to be expedited, and it's going to be all hands on deck when I
23 finally approve an order in the case.

24 It all seems rather casual at the moment. Quite
25 frankly, what's reported in the CFTC's order and the

1 submissions, hundreds of thousands of transactions going
2 unreported, the entire integrity of the market is undermined.
3 People are going to worry about holidays? Not in this
4 courtroom.

5 MS. BURKS: Understood.

6 THE COURT: If the problems are so fundamental, why
7 hasn't Deutsche Bank been suspended from swap transactions?

8 MS. BURKS: There are a lot of considerations that go
9 into a decision like that. One certainly would be the
10 integrity of the markets and the liquidity in the markets.

11 Deutsche Bank is certainly a large player in the swap
12 markets. Our position from the beginning has been that we want
13 Deutsche Bank to correct these problems. This appointment of a
14 monitor seemed like the best way to get them back on track
15 without disrupting all of the swap markets around the world by
16 just shutting them down.

17 As counsel stated, they have been committed to
18 cooperation thus far. So we are hopeful that we can together,
19 along with the monitor, bring Deutsche Bank into compliance.

20 THE COURT: Anything further?

21 MS. BURKS: Nothing further, your Honor.

22 THE COURT: Thank you.

23 Anything further, Mr. Meister?

24 MR. MEISTER: Nothing further, your Honor. Thank you.

25 THE COURT: All right. Did you, Mr. Meister, do

1 anything further to vet these people whose names were
2 submitted?

3 MR. MEISTER: The other two?

4 THE COURT: Yes.

5 MR. MEISTER: Your Honor, we had telephone interviews
6 with both. That's what we did, Judge. Prior counsel also had
7 interviews with them. Actually, I don't know if they spoke
8 directly to the CFTC staff. Your Honor, that's what we did.
9 The result of that is what does come out, particularly with
10 respect to Mr. Tupper, is he has substantial experience in this
11 area.

12 On the other hand, Judge, as pointed out in their
13 memorandum, as your Honor pointed out, he may well have other
14 obligations. He has told us that he is committed to this task
15 and is prepared to sign up, regardless of his --

16 THE COURT: While going to law school full time?

17 MR. MEISTER: I hear you, Judge. Your Honor, I'm
18 reporting to you the vetting process. The other part of it is
19 that if your Honor appointed him, we would have to hire a firm
20 to support him. So I just wanted your Honor to understand it
21 would be a package.

22 THE COURT: How about the other individual?

23 MR. MEISTER: He also has experience, Judge, the same
24 sort of vetting process. He also has experience but not as
25 substantial experience with this particular issue as

1 Mr. Tupper.

2 THE COURT: Is he currently employed?

3 MR. MEISTER: Your Honor, I don't believe so, but I'd
4 have to check that, Judge.

5 THE COURT: The CFTC can hand up at the conclusion of
6 the proceeding the curriculum vitae and the slide presentation
7 for Chatham. This Court is reserving decision with respect to
8 the matter.

9 I can tell you one thing however. A monitor will be
10 appointed in this case, and Deutsche Bank better get ready to
11 cooperate fully with whoever it is that the Court appoints,
12 whether it's one of the nominees of the parties or someone
13 altogether different.

14 Anything else?

15 MR. MEISTER: Nothing from Deutsche Bank, your Honor.
16 Thank you.

17 MS. BURKS: We only ask that the CVs and the slide
18 deck from Chatham be placed under seal if they are made part of
19 the record because they contain confidential information.

20 THE COURT: I find it a little strange that you would
21 nominate to the Court monitors, but you want their CVs under
22 seal. I'm not going to do that.

23 I directed both parties to come up with a couple of
24 candidates because I don't like the presumptions of parties
25 that they can just prepackage what they want to do and go on

1 their merry way, especially when they've been on their merry
2 way for two years in this matter, and it seems like not much
3 has happened.

4 So I'm looking forward to seeing the reports. You can
5 hand up those resumes and the slide presentation. The only
6 thing that I will maintain under seal at this moment -- but
7 I'll feel free to discuss it in any forum that I choose -- is
8 the proposed engagement letter between Deutsche Bank and
9 Chatham.

10 Anything else?

11 MS. BURKS: Nothing further, your Honor. Thank you.

12 MR. MEISTER: Just briefly, your Honor. We would ask
13 that the interim reports be held under seal. Those also
14 contain sensitive confidential information of Deutsche Bank.

15 THE COURT: You can submit them to me under seal, but
16 it's likely that at some point as part of the record in this
17 case I'm going to direct that redacted copies be filed as part
18 of the record. There is apparently considerable interest in
19 this case. I'm not going to keep it in a black box.

20 MR. MEISTER: Yes, your Honor. Perhaps we can put in
21 a letter to your Honor as to why we think it's very important
22 to keep them under seal.

23 THE COURT: I'll always be receptive to an argument
24 and an explanation and a submission.

25 MR. MEISTER: Okay. Thank you, your Honor.

1 THE COURT: All right. This matter is concluded.

2 (Adjourned)

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